APPENDIX A

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO 2-95-133-CR

MARK AVERY HILL STERN
APPELLANT

VS.

THE STATE OF TEXAS
STATE

FROM THE 18TH DISTRICT COURT
OF DENTON COUNTY

OPINION

Mark Avery Hill Stern appeals after the trial court set aside its deferred adjudication order and proceeded to adjudge appellant guilty of the offense of interference with child custody. The court assessed punishment at six years; imprisonment. We dismiss in part and affirm the judgment

In indictment charged appellant with committing the offense of interference with child custody on June 23, 1989. On November 2, 1980, pursuant to a plea bargain agreement, the trial court deferred adjudication of guilt and placed appellant on probation for a term of eight years, also part of the plea bargain.

The State filed its first motion to revoke and proceed to adjudication on July 22, 1991, but it was withdrawn and appellant remained on probation. The State next filed its motion to adjudicate on December 8, 1994 and an amended motion on February 3, 1995. After a hearing on April 6, 1995, the trial court found that appellant had failed to report to the probation officer, failed to pay probation fees and restitution, and failed to attend

Alcoholics Anonymous/Narcotics Anonymous counseling, as ordered. The court adjudicated guilt and assessed punishment at six years' confinement.

Appellant assigns six points of error, first saying this appeal is authorized because the trial court sentenced him to serve six years when the negotiated plea agreement called for deferred adjudication probation of eight years. Appellant next asserts he did not execute a valid, knowing, and voluntary waiver of appeal because he signed the waiver before the court convicted and sentenced him. In his third point of error, appellant argues his guilty plea was not knowing and voluntary because the judge failed to admonish him regarding the effect of deferred adjudication. Appellant next asserts his counsel rendered ineffective assistance because the present version of the statute prohibiting interference with child custody made him eligible to be sentenced under the state jail felony statute. In point of error five, appellant maintains the underlying indictment of interference with child custody was defective. In his last point of error, appellant claims he was denied equal protection because Texas law proscribes his appeal from the proceeding adjudicating his guilt, while a regular probationer may appeal from revocation of probation.

We dismiss the last point if error — denial of equal protection. This contention has been answered adversely to appellant. The United States Constitution does not require the states to provide appellate review of criminal convictions. *Phynes v. State*, 828 S.W.2d 1,,, 2 (Tex. Crim. App. 1992). This is a statutory right in Texas, not constitutional. When a legislative enactment says an accused may not appeal a determination to adjudicate, there is no right to do so. *Id.*, *Olowosuko v. State*, 826 S.W.2d 940,, 941 (Tex. Crim. App. 1992).

In *Buchanan v. State*, 881 S.W.2d 376, 380 (Tex. App.-Houston (1st Dist.) 1994), *dism'd in part, rem. in part, on other*

grounds, 911 S.W.2d 11 (Tex. Crim. App. 1995), the court pointed out that neither the United States nor Texas Constitution requires the State to provide any sort of appellate review. *Buchanan*, 881 S.W.2d at 380; *see Ex part Sorino*, 586 S.W.2d 482, 485-88 (Tex. Crim. App. [Panel Op.] 1978).

The legislature expressly denied the right of appeal from the determination to adjudicate in deferred adjudication proceedings. TEXAS CODE CRIM. PROC. ANN. art. 42.12, § 5(b) (Vernon Supp. 1996). Unless the classification of persons who are granted deferred adjudication interferes with the exercise of a fundamental right or places a burden on a suspect class, the classification will not be set aside on equal protection grounds if it is rationally related to a legitimate state interest. *See Clark v. State*, 655 S.W.2d 476, 480-81 (Tex. Crim. App. 1984).

The right to appeal is not a fundamental right, nor does its denial create a suspect class. As explained in *Buchanan*, the rational basis for treating deferred adjudication probationers differently from regular probationers is shown because there is never a finding of guilt unless the deferred adjudication is revoked. *Buchanan*, 881 S.W.2d at 380. The defendant in turn extends a benefit to the state, conservation of judicial and prosecutorial resources. *Roche v. State*, 903 S.W.2d 789, 791 (Tex App.-Dallas 1995, no pet.).

The defendant is rewarded upon successful completion of the term of probation. There will be no criminal record. But the regular probationer is first found guilty, which is a conviction, before he is placed on probation. By giving this valuable benefit to the recipient of deferred adjudication probation, the Texas legislature could require the relinquishment of the right to appeal. Point of error six is dismissed.

In point of error one, appellant maintains "this appeal is valid under Tex. R. App. P. 40(b)(1) !"because the trial court sentenced him to serve six years rather than eight years pursuant to

the plea bargain. Therefore, he reasons, the trial court did not follow the plea bargain. We do not agree.

A trial court at its discretion may, after considering the full range of punishment, grant a greater or lesser term to serve in a deferred adjudication probation revocation rather than the probation term ordered. Because the adjudication of guilt and punishment are "deferred," there is no true punishment set for the trial court to increase or decrease. Instead, what is often considered an increase in punishment is actually an assessment of confinement in excess of the original deferred adjudication probation term. *See Weed v. State*,, 891 S.W.2d 22, 24 (Tex. App.-Fort Worth 1995, no pet.) (noting discretion of trial court in deferred adjudication revocation to increase the term of years assessed as punishment above the probation term, while the court lacks authority to raise term in "regular" probation revocations). In the present case the court had authority to assess a lesser term of punishment. The court did not violate the plea bargain. Point of error one is without merit and is dismissed.

We agree with appellant's assertion in point of error two that the "Waiver of Appeal," signed by him on November 2, 1990, when he was placed on deferred adjudication, does not operate to foreclose an appeal at this time after his adjudication of guilt. While a defendant may not appeal the determination to adjudicate guilt, he may still invoke appellate review of certain alleged errors after his adjudication of guilt, "including assessment of punishment, pronouncement of sentence, granting of community supervision," and his appeal would continue at that time as if the adjudication of guilt had not been deferred. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5(b) (Vernon Supp. 1996. We must identify the precise matter appellant seeks to appeal and consider only those matters for which the legislature has authorized appeal. *Olowosuko v. State*, 826 S.W.2d at 941; *Qusolla v. State*, 906 S.W.2d 112, 113 (Tex. App.-San Antonio 1995, no pet.).

In point of error three, appellant maintains his plea of guilty was not knowing and voluntary because the trial court failed to admonish him regarding the effect of deferred adjudication. The claim of involuntariness of the plea may be appealed. The record in the present case contains written pre-plea admonishments signed by appellant, his counsel, the State's counsel, and the trial judge covering the range of punishment, the effect of the plea bargain agreement, citizenship, and right of appeal. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon 1989 & Supp. 1006). Appellant acknowledged he understood the admonishments.

During the hearing on November 2, 1990, appellant confirmed his counsel had explained to him the differences between regular probation and deferred adjudication probation, emphasizing that deferred adjudication was a great situation for appellant so long as he lived up to the terms and conditions of probation. Counsel expressly told appellant that if he successfully completed the probation, there would be no final conviction, no judgment, and no sentence. Counsel explained the judge would hold the case in abeyance during the probationary term.

Then appellant's counsel said he had also reviewed the "downside" of deferred adjudication, and appellant said, "That's true." Counsel cautioned if appellant failed to live up to the terms and conditions of probation, the State would file a motion to revoke, and the judge "can come in here and consider the whole range of punishment, meaning up to ten years. I specifically explained that to you, did I not?" Appellant replied, "Yes, you have." Thereafter, the trial court accepted appellant's guilty plea, place him on deferred adjudication, and announced the intensive probation terms and conditions.

In *Shields v. State*, 608 S.W.2d 924, 927 (Tex. Crim. App. [Panel Op.] 1980), the court observed that article 26.13 does not apply to required the trial court to admonish a defendant as to the consequences of deferred adjudication before accepting a plea of

guilty or nolo contendere. The court in *Ray*, held that section 5(b) admonishments were mandatory. *Ray v. State*, 877 S.W.2d 425, 426-27 (Tex. App.-Eastland 1994), *rev'd*, 919 S.W.2d 125 (Tex. Crim. App. 1996). In reversing, the court of criminal appeals held that thee are informational requirements, not pre-plea admonishments which must be given prior to acceptance of the plea and their absence does not render the plea involuntary. *Ray*, 918 S.W.2d at 127. We hold that, unlike article 26.13 requirements, the information requirements in a deferred adjudication case are not a condition to be fulfilled *before* the trial court accepts the plea.

The court in *Price v. State*, 866 S.W.2d 606 (Tex. Crim. App. 1993), held that the failure to give admonishments in a misdemeanor deferred adjudication case does not render the plea involuntary. *Id.* at 613.

In *Brown v. State*, 815 S.W.2d 533 (Tex. App.-Dallas 1995, pet. granted), the court held that failure to give admonishments in that felony case did not render the plea involuntary. *Id.* at 538. It was stated that section 5(a) does not require the court to admonish a defendant under section 5(b) before entry of a guilty plea. Therefore, concluded the court, because the admonishments are not required *before* the court accepts the plea, these admonishments cannot affect the plea's voluntariness. *Id.*

The consequences of section 5(b) are: that the defendant :may be rearrested (the record shows appellant knew this); that the defendant is entitled to a hearing on the determination whether to proceed to adjudication (the record shows appellant knew this and was present); that no appeal may be taken from the determination to adjudicate; and that all proceedings, including the possible appeal process, continue as if the adjudication had not been deferred. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(b) (Vernon Supp. 1996).

Appellant makes no showing of actual harm he suffered because the trial judge did not give him the informational admonishments contained in section 5(b) after accepting his plea. Appellant has not shown what he would have done in 1990 rather than accepting the benefits of deferred adjudication. Moreover, he has presented some questions on appeal which are not precluded by inability to appeal the adjudication.

Although *Price* involved a misdemeanor, we find that the following rationale may be applied in this felony case:

> [W]hen conducting a deferred adjudication proceeding under Sec. 5(a), the trial court is not required to inform defendant prior to declaring an order placing defendant on probation, of possible consequences under Sec. 5(b) of a violation of probation. Therefore, a failure to inform will not render an otherwise unobjectionable plea involunatry. . . .

Price, 866 S.W.2d at 613.

While the better practice would have been for the trial court to pronounce the section 5(b) consequences after placing appellant on deferred adjudication probation, under the circumstances of this case, the failure to do so does not render the plea involuntary.[1] Even if we assume, arguendo, that failure to give the section 5(b) informational consequences was error, we find that the error alone would not render the plea involunatry. Appellant

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[1] The "information" requirement of article 42.12, section 5(a) is now mandated. Effective January 1, 1996, the trial court is directed to inform the defendant of the possible consequences of violations of deferred adjudication probation *after* placing the defendant on that probation. However, "[t]he failure of a judge to inform a defendant of possible consequences under Subsection (b) of this section is not a ground for reversal unless the defendant shows that he was harmed ;by the failure of the judge to provide the information." TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(a) (Vernon Supp. 1996).

has failed to demonstrate any harm he suffered to substantiate his claim that the otherwise unobjectionable plea was rendered involuntary by the omission. Point of error three is overruled.

Appellant next argues that he was denied effective assistance of counsel because he should have been sentenced pursuant to the new version of the statute making interference with child custody a state jail felony.[2]

However, his argument must fail. The Act creating the new state jail felony law provides:

> (a) The change in law made by this article applies only to an offense committed on or after the effective date of this article. For purposes of this section, an offense is committed before the effective date of this article if any element of the offense occurs before the effective date.
>
> (b) An offense committed before the effective date of this article is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose.

Tex. S.B. 1067, 73rd Leg., R.S. (1993); *see also Brady v. State*, 906 S.W.2d 268, 270 (Tex. App.-Amarillo 1995, pet. ref'd) (changes apply only to offenses committed on or after September 1, 1994; *Perry v. State*, 902 S.W.2d 162 (Tex. App.-Houston [1st Dist.] 1995, pet. ref'd).

It is clear that appellant committed the charged offense in 1989, long before the state jail felony provision of that offense became effective. The legislature expressly intended to postpone application of the state jail felony sentencing provision to offenses of interference with child custody committed on or after

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[2] Act of June 19, 1993, 73rd Leg., R.S., Ch. 900, § 1.01, 1003 Tex. Gen. Laws 3586, 2626 (current version at Tex. Penal Code Ann. § 25.03(d) (Vernon 1994).

September 1, 1994. Viewing the totality of the representation of appellant's counsel, and applying the standard of review required by *Ex parte Cruz*, 739 S.W.2d 53 (Tex. Crim. App. 1987), and *Ex parte Duffy*, 607 S.W.2d 507 (Tex. Crim. App. 19800), we find that appellant's counsel was rendering and did render effective assistance of counsel by not arguing that the sentencing law which was inapplicable to appellant's case should be applied. Point of error four is overruled.

In point of error five, appellant contends the underlying indictment was defective because he did not know of the divorce order giving the mother of the child custody several days after he left the state. He says that the mother gave him custody of the child, and he left the state with the child. Therefore, he lacked the requisite culpable mental state.

Appellant waived error, if any. Even if there were a defect of substance in the indictment, which is not reflected, he would have waived that error. *Fisher v. State*, 887 S.W.2d 49, 54-55 (Tex. Crim. App. 1994); *Studer v. State*, 799 S.W.2d 263, 268 (Tex. Crim. App. 1990). However, on its face the indictment is valid.

Here, appellant judicially confessed, waived confrontation of witnesses, waived a jury trial, and pleaded guilty. *See* TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon Supp. 1995). Appellant now argues his denial of guilt, a matter to be presented by evidence at a trial on the merits. Thus, this is an attempted appeal of the sufficiency of the evidence to support the adjudication of guilt, not a defect of substance in the indictment. Under the terms of article 42.12, section 5(b), no appeal may be taken from the hearing in which the trial; court determines to proceed with an adjudication of guilt, and the contention of insufficient evidence is not reviewable. *Daniels v. State*, 915 S.W.2d 771,771 [sic] (Tex. Crim. App. [Panel Op.] 1981). Therefore, this is not an appealable point of error and we dismiss it.

We dismiss in part and affirm the judgment.

/s/ Shirley W. Butts
SHIRLEY W. BUTTS
JUSTICE

PANELS: CAYCE, C.J.; SHIRLEY W. BUTTS, J. (Retired) (Sitting by Assignment); and H. BRYAN POFF, JR., J. (Sitting by Assignment).

CAYCE, C.J., concurs without opinion in which LIVINGSTON, J. (nonpanel) joins.

DO NOT PUBLISH

Tex. R. App. P. 90(c)

Aug. 29, 1996

APPENDIX B

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION,
AUSTIN, TEXAS 78711

April 9, 1997
COA#:; 02-95-00133-CR
RE: Case No. 1576-96
STYLE: HILL, MARK AVERY

On this day the Appellant's Motion for Rehearing was denied.

Troy C. Bennett, Jr., Clerk

DONALD R. SCOGGINS
3100 MCKINNON SUITE 320
DALLAS TX 75201

APPENDIX C

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-95-133-CR

Mark Avery Hill
a/k/a Mark Avery Hill Stern

vs.

The State of Texas

ORDER

On this day the Court considered the appellant's motion for stay of mandate.

The motion is GRANTED and the ;mandate is ordered stayed until the timely filing and a ruling on the appellant's petition for writ of certiorari to the United State [sic] Supreme Court. *See* Tex. R. App. P. 86(c).

The Clerk of this Court is directed to transmit a copy of this order to the attorneys of record, trial court judge, and trial court clerk.

SIGNED this 15 day of May, 1997.

/x/ John Cayce
JOHN CAYCE
CHIEF JUSTICE